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ABSTRACT

This report for Congress discusses the problems involved in developing, putting into practice, and complying with federal equal employment opportunity (EEO) guidelines on employee selection and makes some recommendations. It also discusses other factors which influence the concept of equal employment opportunity and how the concept can be realized in employee selection. The content of this report is in four chapters. The introductory chapter discusses testing for employee selection, the Civil Rights Act, and judicial decisions in testing cases. Chapter 2, focusing on establishing uniform guidelines on employee selection procedures, covers the need for uniform guidelines, the actions of the EEO Coordinating Council (EEOC) toward establishing guidelines (includes major differences between EEOC and Federal Executive Agency [FEA] guidelines), the effects of inconsistent guidelines, and reasons for delay in adopting guidelines. The third chapter discusses other problems in regulating employee selection to achieve EEO, including requirements difficult to understand, how lack of resources hampers compliance, problems with multiagency standards, overemphasis on selection, and professional concerns about federal guidelines. The last chapter briefly summarizes the scope of this report's review. The appendix contains a glossary, professional testing standards and terms, other EEO laws and executive orders, a list of reports on the EEO Act of 1972, areas in which EEOC and FEA guidelines agree, organizations and individuals contacted, and several letters. (EM)

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REPORT TO THE CONGRESS

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BY THE COMPTROLLER GENERAL OF THE UNITED STATES

Problems With Federal Equal Employment Opportunity Guidelines On Employee Selection Procedures Need To Be Resolved

Uniform guidelines on employee selection are needed to

--eliminate conflict, duplication, and inconsistency in the operations of the Federal equal employment opportunity enforcement agencies and

--promote efficiency and credibility in the Federal Government's management of equal employment opportunity programs.

This report examines problems associated with developing, putting into practice, and enforcing the guidelines.

U.S. DEPARTMENT OF HEALTH, EDUCATION & WELFARE
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FEBRUARY 2, 1978

COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

B-167015

To the President of the Senate and the
Speaker of the House of Representatives

This report discusses the problems involved in developing, putting into practice, and complying with Federal equal employment opportunity guidelines on employee selection. It also discusses other factors which influence the concept of equal employment opportunity and how it can be achieved in employee selection.

In June 1973, the Chairman, Senate Committee on Labor and Public Welfare, requested that we review the implementation of the Equal Employment Opportunity Act of 1972, as it applied to Federal employees. This report is one of a series resulting from the Chairman's request.

We made our review pursuant to the Budget and Accounting Act, 1921 (31 U.S.C. 53), and the Accounting and Auditing Act of 1950 (31 U.S.C. 67).

We are sending copies of this report to the President; the Acting Director, Office of Management and Budget; the Secretary of Labor; the Chairmen, Civil Service Commission and Civil Rights Commission; the Attorney General; and the Chair, Equal Employment Opportunity Commission.

Comptroller General
of the United States

CE 017 252

COMPTROLLER GENERAL'S REPORT TO THE CONGRESS

PROBLEMS WITH FEDERAL EQUAL EMPLOYMENT OPPORTUNITY GUIDELINES ON EMPLOYEE SELECTION PROCEDURES NEED TO BE RESOLVED

D I G E S T

The Equal Employment Opportunity Coordinating Council, consisting of the Secretary of Labor, the Attorney General, and the Chairpersons of the Civil Service Commission, Civil Rights Commission, and Equal Employment Opportunity Commission or their respective delegates, was established in 1972 to coordinate Federal equal employment opportunity enforcement efforts. Early in 1973 the Council set out to develop and adopt uniform guidelines for determining the proper use of tests and other selection procedures consistent with the equal employment opportunity requirements of Federal law. After 5 years this work is still not completed.

Why? First, longstanding disagreements on guideline requirements have arisen among the member agencies of the Council. Their views have differed on the legal and technical standards for judging the proper use of tests, and they perceive their mandates differently and have pursued different operating responsibilities.

Second, the Council lacks authority to compel member agencies to change their policies and guidelines or to adopt new ones in the interest of developing uniform positions on matters relating to equal employment opportunity. (See pp. 17 to 21.)

Other important unresolved issues include:

--Eliminating misunderstandings about what the Federal guidelines require employers to do. (See pp. 25 to 27.)

--Obtaining financial and professional resources to put the guidelines into practice. (See pp. 27 to 29.)

--Getting consistent agency interpretation and enforcement of uniform guidelines. (See pp. 29 to 30.)

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--Evaluating the costs and benefits of guidelines and their effect on selection decisions and minority and female employment patterns. (See pp. 30 to 31.)

--Reconciling the competing social values of individual merit and group equality. (See pp. 32 to 34.)

RECOMMENDATIONS TO THE PRESIDENT

The President should direct the Equal Employment Opportunity Coordinating Council to (1) establish a means by which member agencies can agree upon and put into practice consistent equal employment opportunity policies and procedures without unreasonable and lengthy delays and (2) adopt and use uniform guidelines on employee selection procedures.

RECOMMENDATIONS TO THE COORDINATING COUNCIL

The Coordinating Council should in its annual report to the President and the Congress present current, reliable information on the actual costs and effects of putting into practice and enforcing uniform guidelines, once adopted. It should also:

--Develop and issue documents which clearly explain the guidelines and show how to follow them.

--Develop enforcement standards that allow public and private employers to meet the guidelines within a reasonable time and yet not exceed their financial and professional resources.

--Train agency enforcement personnel to apply the guidelines in a consistent manner.

--Review the agencies' use of the guidelines and make changes as needed to maintain consistent enforcement.

--Encourage member agencies to fund research and provide technical assistance to employers for developing and testing cost-effective methods of achieving equal opportunity in employee selection.

AGENCY COMMENTS

The Department of Justice, the Civil Service Commission, and the Equal Employment Opportunity Commission said that their disagreements on the uniform guidelines were not as serious as GAO suggested. They also said that the present leadership of the four agencies could soon reconcile the differences, develop a uniform position, and draft a set of guidelines. (See apps. VII, VIII, and X.)

The Department of Labor agreed, in general, with the report. (See app. IX.)

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ABBREVIATIONS

BNA	Bureau of National Affairs
CSC	Civil Service Commission
EEO	equal employment opportunity
EEOC	Equal Employment Opportunity Commission
FEA	Federal Executive Agency
GAO	General Accounting Office

CHAPTER 1

INTRODUCTION

On March 24, 1972, the Congress amended title VII of the Civil Rights Act of 1964 by enacting Public Law 92-261, the Equal Employment Opportunity (EEO) Act of 1972. The 1972 amendments, among other things, added section 715 to title VII, which established a five-member Equal Employment Opportunity Coordinating Council consisting of the Secretary of Labor, the Attorney General, and the Chairpersons of the Civil Service Commission (CSC), Civil Rights Commission, and Equal Employment Opportunity Commission (EEOC) or their respective delegates. The Council's objective was to develop and implement "agreements, policies, and practices" which would

> "* * * maximize effort, promote efficiency, and eliminate conflict, competition, duplication and inconsistency among the operations, functions and jurisdictions of the various departments, agencies and branches of the Federal Government responsible for the implementation and enforcement of equal employment opportunity legislation, orders, and policies."

In its June 29, 1973, report to the President, the Council emphasized the development of a uniform set of guidelines on employee selection procedures as its "primary project for the year."

Our report provides an overview of the important issues that have developed since the project began. These include legal, administrative, technical, and practical issues associated with developing and putting into practice uniform Federal guidelines on employee testing and selection and on complying with such guidelines. Information is also provided about factors influencing the concept of EEO in employee selection and how to achieve it.

TESTING FOR EMPLOYEE SELECTION

Debates about equal opportunity in employee selection have focused attention on the proper use of written tests, so that written tests have become almost synonymous with the selection process itself. (The term "test" as used in this report denotes any one of a variety of employee selection procedures or measurement methods, such as evaluation of information on application forms, job interviews, performance tests, training programs, and so forth.)

Use of employment tests

Employers spend millions of dollars for outside professional testing services and in-house testing programs to develop and put into practice effective selection programs to help hire the best employees and avoid the costs of poorly selecting and placing employees--low efficiency and productivity, poor morale, high absenteeism, frequent turnover, and so forth.

Written tests have been a frequent and popular means of screening job applicants, particularly among Federal, State, and local governments having merit system coverage. CSC, one of the largest producers and users of written tests, has noted that in many instances such tests are the only available method of meeting the Federal employment requirements for job-related and valid examinations; these requirements call for ranking applicants in order of merit so that selection can be made from among the best qualified. For certain types of positions, particularly clerical and office work, public and private employers have relied heavily upon written tests to evaluate applicants.

Many employers, however, do not use written tests for selection. In 1975 the American Society for Personnel Administration and Prentice-Hall queried 2,500 companies about their employee testing and selection procedures. According to the published results, almost 4 out of 10 of the survey respondents did not use written tests. The poll and a 1975 Georgetown University Public Services Laboratory study of surveys of selection practices in local governments showed that interviews (oral examinations) are more consistently used by public and private employers than any other selection device.

Usefulness of written tests

Discussions about the usefulness of tests in employment have traditionally centered on the extent to which test scores correlate with, are predictive of, or provide information about future job performance. 1/ A comprehensive

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1/ The statement that a test is correlated with job performance means that ranking applicants according to their test scores provides some information about their relative standing in job performance. The stronger the correlation, the more closely the ranking in test scores resembles that in job performance. A perfect correlation indicates a one-to-one correspondence between rank order on the test and rank in terms of job performance. In other words, a perfect correlation means that test scores can be used to exactly predict performance.

LEGISLATIVE PROHIBITIONS AGAINST DISCRIMINATORY SELECTION PRACTICES

The legal aspects of personnel testing and selection are now prominent in personnel management in public and private employment. A variety of Federal, State, and local statutes and executive orders contain EEO provisions regulating personnel selection. EEO legislation as it relates to employee selection seeks to insure that all candidates for a job, training, or other employment opportunity are considered on the basis of factors relevant to job performance rather than such discriminatory factors as race, color, religion, sex, national origin, and age. The status of legal issues involving EEO and testing is determined by these laws, the court decisions, and the decisions and guidelines of regulatory agencies which interpret these laws in given situations.

The 1964 Civil Rights Act

The Civil Rights Act of 1964, as amended, is the most important law directly addressing discrimination in employee selection. Title VII of the act is specifically directed at eliminating discrimination in employment by, among other things, making it unlawful for employers

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

Several provisions of title VII are intended to clarify its restrictive language. One of these, section 703(h), formulated by Senator Tower of Texas and referred to as the Tower Amendment, addresses employee selection procedures and links employment testing to EEO:

> "Notwithstanding any other provision of this subchapter it shall not be * * * an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that

analysis was made of the correlation between test scores and job proficiency or training success.[1/] It examined the results of several hundred published and unpublished studies conducted between 1919 and 1971. For a number of reasons the analysis produced conservative estimates of the strength of the correlations. Nevertheless, it showed that for all jobs and all tests taken together,

--on the average, test scores provided about 39 percent of the training success information and 22 percent of the job proficiency information;

--when only the strongest relationships were counted, test scores provided between 28 and 65 percent of the training success information and 24 to 46 percent of the job proficiency information; and

--on the average, when only the strongest relationships were counted, the test provided 45 percent of the training success information and 35 percent of the performance proficiency information. (Based upon the sample sizes of these studies, these percentages are statistically significant.)

Once a degree of correlation is established between scores on a particular test and measures of job performance, a number of factors determine the usefulness of that test: the strength of the correlation, the number of employees to be selected from the pool of applicants, the percentage of present employees considered satisfactory, and the costs of the test. Tables showing the effects of some of these variables on test usefulness have been available for almost 40 years.

Appendix II discusses testing terms and professionally recognized standards for developing and validating tests and other selection procedures. These terms and standards have been incorporated in Federal guidelines on employee selection and referred to by the courts in determining whether tests are job related. Familiarity with these terms helps in understanding the technical issues involved in fair test development and use.

1/Edwin E. Ghiselli,"The Validity of Aptitude Tests in Personnel Selection," Personnel Psychology, 26, 1973, 461-477.

such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin * * *."

The Tower Amendment was intended to insure the continued use of tests which select applicants solely on the basis of job qualifications so that employers would not be forced to hire unqualified applicants.

The EEO provisions of several other Federal laws and executive orders prohibit discrimination in employee selection and enable Federal agencies to establish and enforce guidelines on testing and selection practices. Appendix III contains a brief discussion of some of these laws and executive orders.

JUDICIAL DECISIONS IN TESTING CASES

The courts have been actively involved in interpreting and enforcing the EEO provisions of Federal laws. In large measure it has been left to the Federal courts to construe what title VII means and to stipulate what is meant by section 703(h), which provides for the use of "professionally developed ability tests" in employment situations. In determining whether a test or other selection practice illegally discriminates, the courts have generally dealt with two basic questions: (1) whether the test has an adverse impact (see p. 39)--that is, disproportionately disqualifies a group on the basis of race, sex, or national origin--and (2) if adverse impact is shown, whether the selection practice having such results is job related--that is, measures for knowledge, skills, or abilities validly related to actual performance of the job. If an employer cannot convince the court that the selection procedure having adverse impact is job related, the court can conclude the procedure illegally discriminates.

In challenges to employment testing and selection practices, the courts have often had to deal with highly technical professional questions about test construction, fair test use, and validation. Predictably, the courts have referred to the guidelines on employee selection procedures issued by the Federal EEO enforcement agencies when considering these technical issues.

Among the best-known legal challenges under title VII to employee testing and selection practices is the case of Griggs v. Duke Power Co., 401 U.S. 424 (1971). In its decision, the Supreme Court said that a test or other requirement for employment which operates to exclude

minorities--irrespective of whether it is intended to do so--is prohibited unless it can be shown to be related to job performance. As section 703(h) was intended to insure, employers can use tests which happen to select a disproportionately higher percentage of white applicants, but the burden is on the employer to show that the selection is on the basis of job qualifications.

The EEOC testing guidelines received Supreme Court approval in Griggs v. Duke Power Co. The decision stated:

> "Since the Act and its legislative history support the Commission's construction [of section 703(h)], this affords good reason to treat the guidelines as expressing the will of Congress." (401 U.S. at 434.)

The Supreme Court in Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975), concisely reiterated the standards for title VII challenges to employee selection procedures.

> "In Griggs v. Duke Power Co., 401 U.S. 424 (1971), this Court unanimously held that Title VII forbids the use of employment tests that are discriminatory in effect unless the employer meets 'the burden of showing that any given requirement [has] * * * a manifest relationship to the employment in question.' Id., at 432. This burden arises, of course, only after the complaining party or class has made out a prima facie case of discrimination, i.e., has shown that the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.' Id., at 801. Such a showing would be evidence that the employer was using its tests merely as a 'pretext' for discrimination. Id., at 804-805. * * *" (Footnote omitted.)

In the Albemarle case, the Court dealt with the question of what constitutes a sufficient showing of job-relatedness with respect to an aptitude test shown to have adverse impact. The Court, noting its statement in Griggs that the EEOC guidelines are "entitled to great deference," again endorsed them by measuring the company's test validation study against the technical requirements of the

EEOC guidelines. Both Chief Justice Burger and Justice Blackmun, in separate opinions, criticized the Court's "wooden application" of the EEOC guidelines. The Chief Justice advocated that the guidelines be given the same weight as well-founded expert testimony.

There have been few title VII actions against the Federal Government. In one case dealing with Federal employee selection, Douglas v. Hampton, 512 F. 2d 976 (D.C. Cir. 1975), the Court expressed the opinion that the test validation standard to be applied to tests used for Federal employment or advancement should be the same as that already recognized in the private sector and expressed in the EEOC guidelines.

This reliance on private sector test validation standards as expressed in the EEOC guidelines may have been due in part to the Court's professed uncertainty about exactly what the CSC standards meant, since they had not been interpreted in an adjudicative proceeding. Nonetheless, the EEOC preference for criterion-related validation studies (see app. II) was held to be among the standards which CSC must follow.

The most recent Supreme Court case regarding testing discrimination is Washington v. Davis, 429 U.S. 229 (1976). Although it does not touch upon the specific problem of the different standards being applied by the Federal EEO agencies and while it is not a title VII case, a statement in the opinion addresses the question as to what methods of test validation are judicially acceptable.

Regarding test validation methods, Justice White noted in a footnote to the opinion:

> "It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job performance. Professional standards developed by the American Psychological Association in its Standards for Educational and Psychological Tests and Manuals (1966), accept three basic methods of validation: 'empirical' or 'criterion' validity (demonstrated by identifying criteria that indicate successful job performance and then correlating test scores and the criteria so identified); 'construct' validity (demonstrated by examinations structured to measure the degree to which job applicants have identifiable characteristics that have been determined to be important in successful job performance); and 'content' validity (demonstrated by tests whose content closely approximates tasks to be performed on the job by the applicant) * * *." 42 U.S. at 247.

The Supreme Court placed great reliance on the EEOC guidelines in the early landmark title VII testing cases. However, the decision in Washington shows a willingness to make independent evaluations and judgments about the job-relatedness of employee selection devices.

CHAPTER 2

ESTABLISHING UNIFORM GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

A great deal of debate about regulating employee selection practices for EEO purposes has focused on the different requirements contained in various Federal guidelines on employee selection procedures and the slow, time-consuming, and tedious process of getting Federal EEO enforcement agencies to develop and adopt uniform guidelines. The EEO Coordinating Council has been working at this process for several years. Its member agencies have had a common objective--requiring employers to show the job-relatedness of selection procedures which adversely affect the employment opportunities of women and minorities. They have disagreed, however, about what an employer must do to justify the continued use of these selection procedures. These disagreements are the result of basic differences in the mandates and responsibilities of the agencies.

During the late 1960s and early 1970s EEOC, the Department of Labor, and CSC, under separate legal authorities, each developed and issued guidelines on the proper use of tests and other employee selection procedures. The impetus for these agencies to develop and adopt uniform Federal guidelines on employee selection procedures began with the establishment of the five-member Equal Employment Opportunity Coordinating Council under the 1972 amendments to title VII. (See p. 1.) In its June 29, 1973, report to the President and the Congress, the Council emphasized the importance of developing uniform guidelines. The report stated:

> "The Council recognized in view of the overlapping jurisdictions of various Federal agencies and the differences in their approach to testing that one of the most critical needs to which it could address itself to achieve improved coordination was the development of a uniform approach to testing for employment in State and local governments. Coordination here was essential since these jurisdictions by law were required to respond to the directives of the Federal agencies involved."

The effort to develop uniform guidelines was clearly in accord with the mandate of the Council to eliminate conflict, competition, duplication, and inconsistency among the Federal EEO enforcement agencies. The Council members agreed that the principles of EEO and employment

on the basis of merit were consistent with one another, and on this basis a uniform set of guidelines was to be developed.

NEED FOR UNIFORM GUIDELINES

At the time the Council began its work in 1973, it was uncertain what direct effect inconsistent sets of guidelines had on test users, test development, court decisions in testing cases, and the overall enforcement of EEO laws. This uncertainty remains, even today. However, it was recognized that having more than one set of Federal guidelines on the same subject is a poor Government policy and EEO enforcement posture. It leads to conflicting EEO enforcement strategies, inconsistent information on minimum legal requirements for employee selection and procedures for test validation, and misunderstanding of the purpose, appropriateness, and results of the Federal Government's involvement in this area.

Private and governmental employers criticized the Federal EEO agencies for having inconsistent guidelines which imposed different requirements for using and validating tests on the same employer. Many persons and organizations pointed out the unfairness involved, since the requirements for some groups of employers were more stringent than for others. Establishing and enforcing inconsistent requirements on the same subject was also considered a needlessly expensive and inefficient use of Government and employer resources. In addition, it led to general misunderstanding and doubts about the Government's management of EEO enforcement efforts.

EEO COORDINATING COUNCIL ACTIONS

In February 1973, the EEO Coordinating Council directed its staff committee responsible for drafting uniform guidelines, as a starting point, to work with the 1970 EEOC guidelines on employee selection procedures and make the changes it considered appropriate. From August 1973 to September 1975 the Council circulated drafts of proposed uniform guidelines for comments. When revising the various drafts, the Council considered comments filed by industry, State and local governments, Federal agencies, psychologists, and civil rights groups.

EEOC reviewed the September 1975 draft agreed upon by the staff committee and determined that it did not represent EEOC's position. It opposed circulation of this draft for prepublication comment, but a majority of the Council disagreed.

The EEOC Commissioners subsequently voted not to endorse the September 1975 draft. They instead directed their staff to review EEOC's 1970 guidelines to see if any revisions were necessary in order to incorporate new developments in the law and industrial psychology. A revision of the 1970 guidelines was proposed by the EEOC General Counsel on February 25, 1976; the Commissioners took no action on it. They indicated that EEOC had no plans, at that time, to update or revise its 1970 guidelines.

Following the prepublication comment period, the Department of Justice, Labor, and CSC revised the September 1975 draft; the proposed guidelines which resulted were published in the Federal Register on July 14, 1976, the beginning of a 45-day comment period.

One member agency, the Commission on Civil Rights, did not participate in the decisions to circulate and publish the proposed guidelines. In its annual report to the President and the Congress dated July 23, 1976, the EEO Coordinating Council indicated that it did not seek or receive the concurrence of that agency because one of its roles is to analyze critically the efforts of other Federal agencies in the enforcement of civil rights laws.

Public comments on proposed guidelines

The EEO Coordinating Council received over 150 comments on the July 1976 draft of the guidelines from Federal agencies, State and local governments and private employers, the American Psychological Association and other professional groups, civil rights organizations, and others. These comments indicated that:

--Federal agencies opposed the guidelines because they were difficult to understand, and implementation would be costly and require professional staff (psychologists) unavailable to the agencies.

--State, local, and private employers generally found the guidelines much more workable and professionally sound than the 1970 EEOC guidelines.

--The American Psychological Association found the guidelines professionally sound and flexible.

--Civil rights organizations opposed the guidelines as a "retreat" from the EEOC guidelines in

both substance and tone, which would weaken the existing legal safeguards against discriminatory employee selection procedures. They cited the Supreme Court's acceptance of the EEOC guidelines.

The comments were reviewed and modifications were made to the draft guidelines. Despite EEOC's opposition to the draft, on November 23, 1976, Justice, Labor, and CSC adopted this common set of guidelines, referred to as the Federal Executive Agency (FEA) Guidelines on Employee Selection Procedures. The three agencies cited the following reasons for adopting the guidelines:

--They better represent professionally accepted standards for determining validity than any existing set of guidelines.

--They are more consistent with the Supreme Court and the authoritative decisions of the other appellate courts than any set of existing guidelines.

--They apply the same standards to the Federal Government as well as Government contractors and others subject to Federal law.

--They are more practical and realistic and will do more to provide actual equality of opportunity than any existing set of guidelines.

--Their adoption is a step toward achieving a uniform Federal position and uniform guidelines.

Currently, Labor uses the FEA guidelines in enforcing Executive Order 11246, as amended, which prohibits job discrimination by Federal contractors. CSC incorporated the guidelines as appendixes to existing Federal Personnel Manual supplements governing the development and use of selection procedures. CSC adopted the guidelines for use in its examining and certification activities, in reviewing the hiring and placement practices of Federal agencies, and in carrying out its responsibilities for helping State and local governments improve their personnel practices. Justice follows the guidelines in enforcing Federal EEO requirements. EEOC, however, retains its 1970 guidelines, which were republished in the Federal Register on November 24, 1976.

Continuing efforts to develop uniform guidelines

In June 1977, Justice, Labor, CSC, and EEOC renewed negotiations to develop and adopt uniform guidelines. In this latest effort, the four agencies have been working with provisions of the FEA and EEOC guidelines in an attempt to develop a set of guidelines which all the agencies will adopt. A new draft of proposed guidelines agreed to by the four agencies during October 1977 was circulated informally for comment. Comments received from representatives of State and local governments, psychologists, private employers, and civil rights groups were taken into account in preparing the draft of proposed uniform guidelines published in the Federal Register on December 30, 1977, for a 60-day comment period.

Briefly discussed below are the major differences between provisions in the EEOC and FEA guidelines; recently proposed draft guidelines dated October 1977 which attempt to resolve these differences are also discussed. (Some of the basic similarities in the EEOC and FEA guideline provisions are described in app. V, together with the October draft provision on each subject. It should be noted that the October draft and the draft of proposed uniform guidelines most recently published in the Federal Register have similar provisions and requirements regarding the issues discussed below and in app. V.)

Areas of disagreement

1. Evidence of adverse impact--The EEOC guidelines do not define adverse impact but suggest that its existence be determined by comparing the rates at which different applicant groups pass a particular selection procedure. On the other hand, the FEA guidelines require employers to collect data showing the overall effect of their selection procedures on persons of different racial, sex, and ethnic groups; so that a determination of the existence of adverse impact is based on the total selection process (rather than its individual components). The FEA guidelines also provide a formula for measuring whether the adverse impact is significant: A selection process which selects a particular race, sex, or ethnic group at less than 80 percent of the rate at which the most successful group is selected generally will be considered to have an adverse impact. The EEOC guidelines contain no such formula or guidance.

The October 1977 draft requirements for determining adverse impact are similar to those in the FEA guidelines. The October draft reiterates that the Federal enforcement

agencies will not take enforcement action based upon the adverse impact of any component of the selection process, provided that the total selection process for a job has no adverse impact. The draft also states that when a test user has not maintained data on adverse impact, the Federal enforcement agencies may draw an inference of adverse impact if the user has an underutilization of a group in the job category, as compared to the group's representation in the applicable work force.

2. Acceptance of validation strategies--The EEOC guidelines indicate a preference for criterion-related validation. The FEA guidelines and the October 1977 draft permit any of the three validation strategies to be used, as appropriate.

3. Additional coverage and requirements--The FEA guidelines and the October 1977 draft extend the definition of employment decisions covered by the guidelines to include licensing and certification boards to the extent these practices may be covered by Federal law. The FEA guidelines and the October draft establish technical standards for validity studies, and contain detailed documentation requirements applicable to all covered employers, including the Federal civil service. CSC is responsible for validating procedures it uses or requires; each Federal agency is responsible for validating any selection procedures it establishes or requires. There are no similar provisions in the EEOC guidelines.

4. Studies of test fairness or differential validity--The EEOC guidelines require validation data to be generated and reported separately for minority and nonminority groups, wherever technically feasible. The FEA guidelines recommend collecting data separately for all groups when criterion-related validation studies are performed--if a selection procedure has an adverse impact on one racial, ethnic, or sex group and there are enough persons in each group (not less than 30) for findings of statistical significance. The October 1977 draft generally calls for studies of test fairness when criterion-related validation studies are performed. The draft states that the concept of fairness or unfairness of selection procedures is a developing concept. Noting that fairness studies generally require large numbers of employees in the job or groups of jobs being studied, the October draft indicates that the obligation to perform such studies generally will be upon large users, consortia of smaller users, or test developers.

5. Search for alternative procedures--Under the EEOC guidelines, a test user is responsible for validating a

selection procedure in which an adverse impact has been found and for demonstrating that alternate selection procedures with less adverse impact do not exist. Under the FEA guidelines, when equally valid alternate selection procedures are available, use of the one demonstrated to have less adverse impact is recommended. An employer is not required to prove that no alternate valid procedures with less adverse impact exist. The October 1977 draft states that when a validity study is called for by the guidelines, the user should investigate suitable alternate selection procedures which have as little adverse impact as possible, to determine the appropriateness of using or validating them in accord with these guidelines. The user is expected to make a reasonable effort to become aware of such alternate procedures.

6. Definitions and explanations--The FEA guidelines and the October 1977 draft contain a definitions section of terms used. The EEOC guidelines define a few major terms, but there is no special section for definitions. The FEA guidelines were supplemented in January 1977 by a question-and-answer document. The EEOC has not issued a corresponding explanation of its guidelines.

In summary, the similarities between the FEA and EEOC guidelines indicate that the four agencies have continuously shared the objective of requiring that job-relatedness (validity) be shown for selection procedures having an adverse impact on the employment opportunities of minorities and females. (See app. V.) The agencies have disagreed, however, on what employers must do to demonstrate validity and justify continued use of selection procedures which have adverse effects. The December 1977 publication of proposed uniform guidelines in the Federal Register shows that the agencies have reached tentative agreement on these points.

EFFECTS OF INCONSISTENT GUIDELINES

Employers have criticized the Federal EEO agencies for adopting different sets of guidelines, thereby not providing uniform information and consistent advice on the minimum legal requirements for selecting employees and validating tests. Since the jurisdictions of the various agencies coincide in certain areas, sometimes two different sets of guidelines are imposed on the same employers. For example, employers with Government contracts subject to supervision by the Department of Labor's Office of Federal Contract Compliance Programs are also subject to EEOC jurisdiction under title VII. Similarly, EEOC would have authority to process complaints against State and local governmental units at the administrative level, while the Department of Justice has authority to carry the

proceedings into court. CSC, in a somewhat different situation, might set the standards for State and local governmental units to use in screening employees in cases in which Federal money is used to upgrade personnel management; but EEOC would have authority to process complaints of discrimination based on testing practices.

The Chief Deputy Director of Personnel of the County of Los Angeles has described the situations in which a public employer encounters different Federal requirements on testing and employee selection as follows:

> "Currently, employers are caught in a web of conflicting enforcement strategies of the different compliance agencies. Compliance officers of the different agencies sometimes have different views about the interpretation of regulations. Moreover, different agencies frequently have different reporting requirements which require the employer to maintain complex and, in some cases duplicate record-keeping systems. Finally, employers sometimes have several concurrent roles: grant-in-aid administrator, prime contractor, and employer with general liability for observation of equal employment opportunity laws. The same employer may be subject to regulations of OFCC [Office of Federal Contract Compliance] concerning his prime contractor responsibility; the Office of Revenue Sharing, the Civil Service Commission, and other departments of the Federal Government concerning his grant-in-aid administration responsibility; and EEOC as the employer's decisions are affected by title VII of the Civil Rights Act. Employers often need to develop separate programs to manage each role."

An employer could devote time and resources to meeting the requirements of one set of guidelines and yet fail to satisfy the requirements of a competing set of guidelines. If a Federal contractor, for example, satisfied the Office of Federal Contract Compliance standards (FEA guidelines), the company would be protected against sanctions or suit under Executive Order 11246. (See app. III.) However, the company would still be vulnerable to suit under title VII if its tests did not adhere to the EEOC guidelines.

When one Federal agency approves or requires a given employment practice, this approved course of action in no way protects an employer from violating a requirement of another Federal agency. The reaction of employers to this situation, besides a mixture of anger and confusion over which directive to follow, may include dropping a lot of tests.

Advantages of uniform guidelines

In addition to their criticisms of the inconsistent agency standards, public and private employers have cited various advantages which would result from the adoption of uniform guidelines. Among those most frequently mentioned are:

--Fairness. The same standards for test use and validation would be applied to the Federal Government, private employers, and State and local governments.

--Efficiency. Test users could more readily develop and validate tests if they were required to understand and follow only one set of guidelines.

--Credibility. Providing one standard against which test users, regulatory agencies, and the public can measure and evaluate the results of a selection program would lessen misunderstanding of the purpose, appropriateness, and results of the Government's efforts to regulate employee selection.

--Consistency. In the case of Douglas v. Hampton, EEOC and CSC opposed each other on how to validate tests. Reconciling the differences in the guidelines would enable the Government to develop and maintain a consistent enforcement posture and litigation position in testing cases. Without conflicting directives from the EEO enforcement agencies, it would be easier to achieve consistency in the way courts evaluate an employer's selection practices.

REASONS FOR DELAY

The EEO Coordinating Council members have been working to develop and adopt uniform guidelines for the past 5 years. Why is it taking so long for these agencies to reach agreement?

First, the agencies have had longstanding disagreements about guidelines requirements. This is because their views have differed on the legal and technical standards for judging the proper use of tests; also, the agencies perceive their mandates differently and have pursued different operating responsibilities. No agency has been willing to adopt uniform guidelines which it believed would seriously impair its ability to operate and meet

program goals. EEOC, Labor, and CSC each had its own rationale for developing its particular set of guidelines and its own approach to putting them into practice and evaluating the results achieved.

The guidelines developed to carry out one of these agencies' objectives can frustrate the objectives and requirements of another, making it difficult to develop a set of guidelines compatible with the varied operating responsibilities of all EEO enforcement agencies. For example, it appears that basic differences in the mandates and responsibilities of CSC and EEOC hampered efforts to reach agreement on a common set of guidelines.

EEOC mandate

The main task of EEOC is to enforce the mandate of title VII to eliminate employment discrimination against individuals and groups. Finding the selection process responsible for more discrimination than perhaps any other area of employment practices, EEOC developed its guidelines on testing to help correct this. The guidelines established the enforcement posture of the agency. They made it clear that EEOC required that tests resulting in adverse effects on the employment opportunities of racial, sex, or ethnic groups be validated so that members of these groups would not be discriminated against.

The overall goal of the 1970 EEOC guidelines was to get employers to use selection devices and procedures which met their business or operational needs and yet had the least adverse impact because of race, sex, religion, or national origin. The short-term goal was to eliminate the use of unvalidated tests which had adverse effects. If, in the long run, tests were validated but still had adverse effects, then the goal was to see if employers could develop alternate means of selection which satisfied their needs but lessened the impact.

EEOC indicated that issuance and enforcement of the agency's guidelines brought important results which included:

--Reducing the use of discriminatory unvalidated tests.

--Increasing employment opportunities for minorities and women.

--Encouraging the testing community to develop more job-related selection procedures.

The EEOC guidelines have been strongly supported by various civil rights groups, psychologists, and employers for providing effective barriers against the discriminatory use of selection procedures. The guidelines have been recognized by the courts in many testing cases. (See ch. 1.) The guidelines have given EEOC a sound enforcement position and have helped achieve its mandate of eliminating employment discrimination. Adopting the FEA guidelines, which do not incorporate the definition of discrimination and many of the principles endorsed in the EEOC guidelines, would in the opinion of EEOC and others have impaired EEOC's ability to reduce employment discrimination against racial, sex, or ethnic groups.

CSC mandate

The merit system laws and selection procedures under which CSC and many State and local governments operate were not designed and have not been administered to achieve a representative work force in terms of race, sex, or ethnicity.

The Civil Service Act of 1883, which established CSC, called for bringing the most qualified individuals into public service by ranking candidates on the basis of evaluated ability and fitness and use of a selection process that honors this ranking. In the period since 1883, CSC has established an extensive recruiting and examining network for the purpose of carrying out the requirements that appointments be based on individual merit and that everyone be given an opportunity to compete.

CSC is also responsible for overall supervision and enforcement of EEO laws in the Federal civil service. There is no inherent conflict between a merit selection program and EEO; but merit system procedures have, for the most part, not dealt with the meaning of equal opportunity for groups nor the extent and appropriateness of actions to achieve the goal of a representative bureaucracy. This has especially been the case when the methods for obtaining that representation have differed substantially from current merit procedural requirements, which call for ranked registers, selection on the basis of ranking, and equal opportunity for all individuals to be considered. Regarding this, an article in the Civil Service Journal, a CSC publication, concluded:

> "For Federal, and also for other employers operating under merit system requirements, the emphasis remains on individual merit. The mandate is for

valid, job-related procedures with economic value. Scientifically, these conditions can be met, for psychometric theory is based upon individual differences. A test can fairly and accurately provide equal opportunity for individuals to demonstrate ability to perform a job. What the psychological measurement cannot do is provide a valid procedure that assures equal probability of success for members of groups based on characteristics unrelated to performance ability, when real ability levels differ among members of the groups."

Whereas the EEOC guidelines set forth the technical requirements employers had to meet to justify continued use of tests shown to have adverse impact, the CSC testing standards specified requirements for the development and use of all Federal examinations, even if the procedures had no adverse impact on any group.

The CSC standards made it clear that Federal examining practices were based on the idea that tests which were reasonably related to job requirements did not discriminate on the basis of race or sex. The policies and procedures set forth by CSC were intended to bring about the systematic review and collection of evidence to verify the job-relatedness, validity, and conformity with merit principles of Federal examining standards and practices. Compliance with the CSC standards was intended to help maintain high quality staffing at reasonable costs and insure that Federal examining practices were not affected by nonmerit factors, such as discrimination.

The competitive examining and selection programs CSC uses and approves for Federal agency use are subject to review and litigation under whatever guidelines are applicable to the Federal Government. CSC has contended that the Federal Government and other merit system employers do not have the resources to operate under the definition of discrimination and the validation standards contained in the 1970 EEOC guidelines. On the other hand, while Federal agencies are concerned about the practical aspects of putting into practice the FEA guidelines, CSC believes the Federal Government and other merit system employers can follow these requirements.

The different mandates under which CSC and EEOC operate have prompted them to perceive and pursue EEO in different ways, to apply different standards in judging the proper use of tests, and to delay development of uniform guidelines.

EEO Coordinating Council lacks authority

There is another reason for the long delays in adopting uniform guidelines--the EEO Coordinating Council lacks authority to carry out its mandate to develop and put into practice agreements, policies, and practices among the EEO enforcement agencies.

The Council has no power to require member agencies to change their regulations and guidelines or to adopt new ones in the interest of developing uniform Federal positions on EEO matters. When agencies have disagreed, the EEO Coordinating Council has had no means of forcing compromise and final agreement. Nothing that affected the significant interests of a member agency could be done without its consent.

EEOC believed the FEA guidelines would significantly weaken its ability to enforce title VII; CSC, Justice, and Labor perceived the EEOC guidelines as imposing unrealistic, professionally outdated, and costly operating standards on employers which in some cases could not be met. The Council could not get the agencies to resolve their differences in the interest of timely development and adoption of uniform guidelines. These differences have precluded prompt development of uniform guidelines. The adoption of uniform Federal guidelines is still not completed.

CONCLUSIONS

When the EEO Coordinating Council members began meeting in 1973, they agreed that uniform guidelines could be developed, since the principles of EEO and merit employment were not contradictory. The two principles can, no doubt, be defined in a consistent manner; the agencies need to strike a balance between the CSC approach to equal opportunity for the individual (individual merit), under which it has operated its examining and selection system, and EEOC's approach to equal employment opportunity, which places greater emphasis on the need for employers to demonstrate that there is no discrimination against racial, sex, and ethnic groups. We believe this conflict in the ways CSC and EEOC operate has hampered development and timely adoption of uniform guidelines.

The 5-year effort to develop uniform guidelines on employee selection demonstrates that the mandated objective of the EEO Coordinating Council--to develop and put into practice agreements and policies which promote

efficiency and eliminate duplication and inconsistency in the operations of the EEO enforcement agencies--is not likely to be achieved in a timely manner, if at all, unless the member agencies compromise and reach agreement.

AGENCY COMMENTS

Justice, CSC, and EEOC said that the differences separating them were not as deep seated as we have suggested; their view is that the present leadership of the four agencies can soon reconcile these differences, develop a uniform position, and a draft set of guidelines. (See apps. VII, VIII, and X.)

We recognize that development of the October 1977 draft of uniform guidelines and publication of a draft in the Federal Register on December 30, 1977, indicate that the four agencies can, with time, reconcile differences among themselves. However, the fact that it has taken the agencies 5 years to reach tentative agreement on guidelines provisions suggests that the differences in their views have not been minor. Also, the CSC statement (see app. VII) that detailed comments on our report by each of the four agencies "would have the effect of exacerbating differences thus making it more difficult to achieve a uniform position" suggests that major differences among the agencies may still exist.

We believe that basic differences in their mandates and operating responsibilities prompted the EEO enforcement agencies, particularly EEOC and CSC, to perceive and pursue EEO in different ways, which hampered efforts to reach agreement on uniform guidelines. Since the EEO Coordinating Council cannot force member agencies to change their views, policies, or practices in order to promote uniform Federal positions on EEO matters, the process of resolving disagreements among the agencies about uniform guidelines has been a voluntary one. It has been a slow, time-consuming process which is not yet complete. To carry out its mandate, the Council needs to establish a means by which member agencies can agree on and put into practice consistent EEO policies and practices in a timely manner.

In its comments, Labor said that the report should have discussed in greater depth the practical implications of having more than one set of guidelines. (See app. IX.) However, as we pointed out earlier in this chapter, it is uncertain what direct impact more than one set of guidelines has on test users, test development, court decisions in testing cases, and overall enforcement of EEO laws. Nevertheless, the existence of more than one set of guidelines on the same subject is poor Government policy. It

leads to confusion over what an employer must do to meet the requirements of Federal EEO laws; it also causes conflicting EEO enforcement strategies and general misunderstanding and doubts about the Government's objectives in regulating employee selection and the management of EEO enforcement activities.

Justice believes the report

> "does not adequately deal with the ramifications of the issue of achieving professionally acceptable standards for test validation that are consistent with the intent of the Civil Rights Legislation passed by Congress." (See app. X.)

We wish to reiterate that the purpose of our review was to delineate some of the administrative, technical, and practical considerations involved in developing, putting into practice, and complying with Federal guidelines on employee testing and selection. All existing and proposed guidelines are intended to be consistent with existing Federal law and professional testing standards. We did not set out to determine which agency's approach to EEO was "correct." Rather, we have pointed out that the guidelines developed to carry out the requirements of one law could frustrate the requirements of another, and make it difficult to develop a set of guidelines compatible with the responsibilities of all the EEO enforcement agencies. Justice's recommendation that steps be taken to establish a uniform posture concerning enforcement of civil rights legislation has been accepted by the Congress, as shown by the creation of the EEO Coordinating Council, and this report, as noted above, deals with problems encountered in putting into practice this congressional mandate.

RE ENDATIONS

Jntil the Federal civil rights agencies are reorganized or merged so that there are no overlapping programs and inconsistent enforcement and compliance standards, the agencies will need to coordinate their EEO enforcement policies and procedures to help insure uniformity.

The 5-year effort to adopt uniform guidelines on employee selection procedures demonstrates that the objective of the EEO Coordinating Council--to develop and put into practice agreements, policies, and practices which promote efficiency and eliminate duplication and inconsistency in the operations of the EEO enforcement agencies--cannot be achieved in a timely manner unless the member agencies compromise and reach agreement. There-

fore, we recommend that the President direct the EEO Coordinating Council to establish a means by which member agencies can agree upon and put into practice consistent EEO policies and procedures without unreasonable and lengthy delays. The President should also direct the Council members, in the spirit of such an agreement, to adopt and follow uniform Federal guidelines on employee selection procedures.

CHAPTER 3

OTHER PROBLEMS IN REGULATING EMPLOYEE SELECTION TO ACHIEVE EEO

We looked at other concerns employers and test researchers have expressed about Federal regulation of selection practices, aside from the issue of uniform guidelines. Private and governmental employers are directly regulated and affected by the Federal guidelines on employee selection; we believe their views on the costs, benefits, and problems associated with following Federal guidelines and achieving equal opportunity in employee selection deserve the careful attention of the Federal EEO enforcement agencies and the Congress. We did not verify the accuracy of the information provided by individual employers and employer interest groups.

REQUIREMENTS DIFFICULT TO UNDERSTAND

The subject matter discussed in the Federal guidelines on employee selection is technical and complex. While the guidelines make clear the need either to change or validate any test having adverse impact, many employers, especially in small organizations, complain that they cannot understand the Federal guidelines' technical standards for validating tests well enough to implement them. To comply with the guidelines, these employers believe they are forced into dropping tests which have any adverse impact, even though they may be job related, since they cannot meet the guidelines' validation requirements.

The 1975 American Society for Personnel Administration/Prentice-Hall survey indicated that the majority of the smallest firms polled (those employing 1 to 99 employees) "encountered their biggest problems just trying to keep current on EEO requirements." Six out of ten respondents in this group said they found the EEOC guidelines "somewhat confusing" or "very confusing." The majority of the firms in this group had not conducted validation studies.

The larger firms surveyed generally said that they understood the Federal guidelines on testing. Larger firms were also more likely to validate their tests. A similar situation exists among governmental employers. Compared to large city and State governments and Federal agencies, small municipal governments and Federal agencies are less likely to have professional personnel staffs with

the technical abilities necessary to understand the Federal guidelines.

Employers often have difficulty comprehending the technical requirements of the guidelines because neither they nor their personnel staffs have training in the areas of knowledge with which the guidelines deal (for example, psychometrics, validation strategies, advanced statistics). All sets of guidelines refer employers to American Psychological Association Standards for guidance on how to perform validation studies. These standards are designed as reference tools for persons who have advanced training in education or psychology. Since it is estimated that only about 10 percent of all industrial testing programs are directed by people who have graduate degrees in psychology, it is likely that most personnel practitioners have difficulty understanding the "guidance" provided by the American Psychological Association Standards.

Some employers have suggested that since most personnel decisions are carried out by such practitioners, additional guidance in the form of easy-to-read handbooks or manuals on how to enforce and follow the guidelines would better insure that both test users and agency compliance personnel understand specific guideline requirements. On this point, one public personnel specialist has suggested:

> "What is needed is a step-by-step description of the validation process with specific examples of appropriate and inappropriate methods. Examples of acceptable statistical procedures would be particularly helpful for the inexperienced test administrator and references for additional information should be made to works that are designed for comprehension by the layman, not graduate specialists in psychometrics, as is now the case."

The Federal EEO enforcement agencies do help employers interpret guidelines' requirements and improve their employment practices. For example, to interpret and clarify various provisions, the three agencies issuing the FEA guidelines jointly published in the Federal Register of January 21, 1977, a series of answers to commonly asked questions about the guidelines. Some test users have indicated that the questions and answers were not helpful in their present form because they confused the technical issues and seemed to create new requirements.

Conclusion

Some of the public criticism of Federal guidelines may be the result of general confusion and misunderstanding about what the guidelines specifically require an employer to do. Providing materials that clearly explain the guidelines' requirements would probably improve agency enforcement and employer compliance efforts.

LACK OF RESOURCES HAMPERS COMPLIANCE

To our knowledge, there are no reliable estimates of the average cost of validating tests or otherwise following and enforcing the mandatory requirements of Federal guidelines. Test validation, in most cases, is a costly and time-consuming process. Many employers, particularly governmental employers, have stated that they lack the financial and professional resources to comply with the validation requirements of the Federal guidelines.

The 1975 American Society for Personnel Administration/ Prentice-Hall survey reported that the majority of the respondents (71 percent) spent less than $5,000 validating selection procedures per job studied. Large firms tended to spend more than small firms. The survey did not report on the types of validation strategies used by the respondents.

In 1974 the city of Hartford, Connecticut, estimated an average cost of about $5,000 per validation study (or $2 million total) to validate its selection procedures alone, excluding other personnel actions. Hartford's personnel director estimated that the city spent $100,000 validating selection procedures for police officers.

The reported costs incurred by public employers in conducting criterion-related validity studies ranged from a low of $6,000 to validate an examination for firefighters in Minneapolis to $401,000 to validate a State police examination in New York. Criterion-related validation studies are generally more expensive to conduct than content validity studies. We obtained no information concerning the quality of these studies and do not know whether the studies met professional validation standards.

CSC has estimated that the costs of implementing and enforcing the FEA guidelines in the Federal agencies and at the State and local government level would run into several millions of dollars. These costs would be in addition to present spending, not in place of it. According to CSC, money must be budgeted for new data systems, increased

recordkeeping, training materials, additional staffing, and so forth.

Some public personnel officials have indicated that the budgetary support in State and local governments for personnel management is already severely limited. They believe taxpayers will not approve the additional expenditures necessary to follow Federal guidelines and carry out extensive validation programs. Without the necessary funding, smaller personnel departments may have to either discontinue testing when there is evidence of any adverse impact or else concentrate scarce resources into just one area--employee selection procedures. Federal agency personnel officials have also expressed doubts about obtaining the funding needed to comply with the FEA guidelines through the Government budgetary process.

Clearly, employers are concerned about how to obtain and allocate resources to be spent meeting guideline requirements in relation to resources needed for other personnel management priorities. Employers have also expressed reservations about obtaining and paying for the services of competent researchers to conduct validation studies. Generally, to meet the technical standards of the guidelines requires the services of qualified testing psychologists. The American Psychological Association has stated that there is "a very limited supply of professional industrial psychologists qualified to design and carry out validation research." The professional resources needed to develop and validate measurement devices that will meet the guidelines' technical standards are inadequate. Reportedly, individuals who are competent in these areas can earn salaries well above $30,000 annually. These services, even on a consulting basis, are often considered too expensive for many public and private employers to use.

Conclusion

It is clear that some employers believe the Federal guidelines have been developed without emphasis being placed on whether or not it is feasible to follow them, in terms of either costs or the availability of professional resources. Public personnel officials have suggested that financial implications and the lack of sophisticated personnel practitioners at all levels of government--local, State, and Federal--preclude effectively implementing the guidelines.

Some employers may overstate the real costs involved in trying to follow the guidelines and validating their

tests; perhaps they do this to create a reason why validation cannot be done or other guidelines' requirements met in an administratively feasible way. Since the key factor in Federal guidelines for requiring test validation is adverse impact, some employers may use alternate selection procedures or privately impose race or sex hiring quotas in order to achieve representative employment among applicant groups and thus avoid validating their tests. In doing so, objectivity, reliability, and validity of the selection process may be overlooked or sacrificed. Such actions contribute to the view expressed by some employers that the emphasis Federal EEO agencies place on valid testing is primarily a smokescreen to promote greater hiring of women and minorities, rather than a legitimate effort to promote development of job-related tests which have as little adverse impact on race, sex, and ethnic groups as possible.

PROBLEMS WITH MULTIAGENCY STANDARDS

Since the adoption of the FEA guidelines by Labor, Justice, and CSC, some test users have expressed concerns about the practical problems involved in following multiagency standards. With adoption of any common set of guidelines, questions arise about their consistent enforcement and interpretation and the time allowed to comply with them.

There is no provision within the FEA guidelines for a single source of information on and interpretation of the guidelines. Each agency decides how it will use them in its EEO enforcement activities. Some test users believe the compliance personnel of the three agencies vary a great deal in the ways they interpret and apply guidelines. They point out that if the agencies place different emphasis on important features of uniform guidelines, then consistent interpretation and enforcement will be hampered.

In addition, the FEA guidelines do not discuss a common time limit for requiring employers to meet the minimum recordkeeping and documentation requirements imposed by the guidelines. CSC has indicated that putting the FEA guidelines into practice Government-wide will require careful planning and much leadtime. CSC has estimated that State and local governments collectively also need several years to meet FEA recordkeeping and documentation requirements. Time is needed to change or develop new data systems, validation strategies, training programs, and so forth. Labor, however, has been evaluating validity studies submitted by Federal contractors

in accordance with the FEA requirements since December 1976.

Conclusion

Many factors influence the willingness, ability, and the time it takes an employer, particularly a public employer, to validate tests or make changes in selection practices for EEO purposes. A 1975 report by the Public Services Laboratory of Georgetown University on affirmative action in city personnel systems noted:

> "While there is some progress toward and interest in the elimination of artificial barriers, poor local EEO statutes, little personnel office autonomy, low staffing levels, and questionable technical competence in the majority of personnel departments--all make intelligent compliance with affirmative action mandates and test validation requirements problematical if not impossible."

It may be useful for the EEO enforcement agencies to evaluate the factors which influence the ability of public and private employers to follow the minimum record-keeping and documentation requirements and develop realistic time limits for requiring compliance with various aspects of the guidelines. In this way, certain groups of employers, such as Federal contractors, would not be forced to move to meet the guidelines' requirements faster than others, nor would they be permitted to lag behind.

To avoid the problems of inconsistent enforcement strategies and interpretation of guidelines, it may be helpful, as one municipal personnel director has suggested, to continuously review the ways the agencies apply the guideline provisions. Additionally, training the agencies' enforcement staffs to interpret and uniformly apply the guidelines would more readily assure consistent enforcement efforts and similar agency explanations about how to comply with the guidelines.

OVEREMPHASIS ON SELECTION

The controversy over developing uniform guidelines has focused almost exclusively on the pros and cons of validation techniques and the need to include or omit specific technical requirements. Some employers contend that the Federal EEO agencies have placed too great an emphasis on technical issues, and have failed to develop an evaluation component to help insure that guidelines do, in fact, have a positive impact on selection programs

and minority and female employment patterns.

According to some employers, many organizations are encouraged by Federal guidelines to spend their personnel resources on indepth test validation studies even though this may not likely produce an increase in the number of tests, especially written, that do not have an adverse impact on minorities. These employers believe that resources spent on test validation to follow Federal guidelines would in many cases be better spent elsewhere in the personnel system (for example, on recruiting, job restructuring, training, and so forth) for EEO purposes; the resources might also be used to make changes to civil service laws and regulations (veterans' preference, apportionment, and so forth) which may restrict the employment opportunities of women and minorities in Federal, State, and local governments. Employers believe that an increase in resources to improve testing generally means that fewer resources are available to make improvements in other aspects of personnel management which would contribute to the hiring and promotion of women and minorities.

A 1976 Bureau of National Affairs survey of companies' EEO programs indicated that three-fifths of the companies responding had made some changes in their selection techniques for EEO reasons. Statistics in the same study showed increases in the percentages of minorities and females employed by these companies. Such survey findings may indicate that the visibility of enforcement activities involving Federal guidelines has prompted increasing numbers of employers to validate their selection procedures or otherwise remove arbitrary barriers to minority and female employment.

Conclusion

In order to adequately evaluate the costs, benefits, and impact of guidelines on selection programs and employment patterns, the Federal agencies responsible for enforcing the guidelines would have to collect and report current and reliable data on the actual costs and results of administering, putting into practice, and complying with the guidelines. Federal efforts to regulate selection practices should not overshadow the need to investigate and improve other parts of a personnel system or civil service laws which are not specifically regulated by guidelines but offer substantial EEO rewards. Employers believe, and we agree, that the Federal EEO enforcement agencies have an obligation not just to regulate employment practices, but to assist in developing and testing cost-effective methods of achieving EEO.

PROFESSIONAL CONCERNS ABOUT FEDERAL GUIDELINES

In attempting to develop uniform guidelines, some of the biggest disagreements among the agencies have focused on the proper interpretations of professional testing concepts. Early in the professional debate over the implications of title VII and the development of Federal guidelines, minority group selection was considered a fairly simple problem. Those in the psychological profession now appear to be moving toward a view that minority group selection is a complex social problem whose remedy is not inherent in "better" selection measures.

Initially, psychologists believed that scientific analysis of the relationship between test scores and job performance might support a hypothesis of differential validity--a hypothesis that tests valid for the majority group were less valid or invalid for the minority group, thus unjustly rejecting minorities by erroneously predicting their inability to perform on the job. Tests, it was thought, simply did not predict performance as well for some groups as for others. If the hypothesis was supported, the solution was considered simple: Valid tests would be substituted for invalid tests, or those which were less valid would be weighted differently in making selection decisions for minorities.

By 1968, two studies had been published which appeared to support the hypothesis of differential validity in industrial selection, although a larger number of studies indicated no such support in college and military settings. The industrial studies were sufficient for a requirement of separate validations to be incorporated into the 1968 Labor Department Testing Order and the 1970 EEOC guidelines.

Professional research studies since 1968 have called into question the methodological and mathematical soundness of the earlier studies which supported differential validity. More sophisticated analysis has since shown that studies supporting the differential validity hypothesis are best explained by chance and thus prove nothing. Consequently, most concerned professionals today expect that a test found valid for majority group members would be just as valid for minorities. In essence, when tests are valid predictors of majority group performance and minorities score lower on the tests as a group, they also do less well as a group on the job.

Psychologists have developed a number of statistical definitions and models of "fair" selection tests. One commentator, Nancy Cole of the University of Pittsburgh, has divided these models into three classes. The first class simply says that fairness is accomplished when deserving groups are adequately represented among selected applicants. Test scores can be used to aid in selection, but are not permitted to interfere with achieving adequate representation. This quota-based model has never been accepted by those in the psychological profession since it does not permit selection on the basis of job-related traits when such selection would lead to disproportionate representation among applicant groups.

The second class of models says that fairness is treating individuals alike according to their likelihood of performing well. Until about 1971, this class of models was largely unchallenged by psychologists as the proper procedure for selection. These models incorporate such social values as maximizing productivity, basing competition on merit and equal opportunity for the individual, and minimizing state intrusion in the affairs of business.

The third class of models says that fairness is treating groups alike according to how well they have actually performed. Models in this class differ from those in the second in that they focus on equality of opportunity for groups rather than individuals, and on actual as compared with predicted performance. These models incorporate the social value of compensating members of certain groups for inequality of opportunity.

In most testing situations, models of the second and third class lead to opposite conclusions about test fairness. One professional research study points out that when a model of the second class was applied to published studies on test validity, minority group job performance was predicted to be higher than it actually turned out to be. Thus, tests are either unbiased or biased in favor of minorities according to this model. When a model of the third class was applied to the same studies, the researchers found many tests would be judged unfair to minority groups since fewer of them were selected than should have been, based on job performance.

The EEOC and FEA guidelines hold that a test is fair if test scores accurately predict future levels of job performance for all groups. These guidelines and the October 1977 draft of proposed uniform guidelines call for studies of test fairness. Some psychologists believe that

research evidence is now very strong that tests which are valid and fair for whites are just as valid and fair for minorities, so that there is no basis for continuing the requirement to perform test fairness studies.

Conclusion

The professional debate over models of test fairness essentially concerns social values and focuses on how to achieve equal opportunity for all job applicants while at the same time assuring full minority, ethnic, and sex group participation in the Nation's work force. These debates revolve around a conflict in value systems--those which emphasize individual merit versus those which stress group equality. Relationships between these concepts have become confused so that it is difficult to know what standards to use to evaluate the fairness of selection procedures. If one model of test fairness gains explicit favor in the professional community and is endorsed by a Federal EEO agency, it will have an important impact not only on test development and validation, but also on the concept and goals of EEO.

AGENCY COMMENTS

Justice was the only agency to comment on the issues discussed in this chapter. (See app. X.) Justice believes the report does not adequately recognize the "crucial difference between guidelines application to the public versus private sectors."

In Justice's view, private employers have greater flexibility in the procedures they use to make employment decisions than do public employers operating under civil service procedural requirements. Justice believes private employers can more readily comply with the Federal EEO guidelines than public employers. One of our previous reports discussed some fundamental problems which affect the Government's EEO efforts. 1/ We questioned whether EEO program objectives and efforts might be in conflict with merit system procedures and practices, and if so, what could or should be done to eliminate or minimize the conflicts.

It came to our attention in this review that some civil service procedural requirements, such as veterans'

1/"Problems in the Federal Equal Employment Opportunity Program Need to be Resolved," FPCD-76-85, Sept. 9, 1977.

preference, apportionment, and selection among the top three candidates on a register, are perceived as barriers to the employment opportunities of women and minorities in the civil service. In a recent GAO report, we discussed how women's opportunities for Federal employment are diminished by veterans' preference and apportionment. 2/ CSC and the President's Reorganization Project are investigating these problems and how to resolve them.

The Federal EEO guidelines do not require "an adjustment of procedures to result in more minority selections," as Justice suggests. The Federal guidelines require that when there is adverse impact, the user must demonstrate and document the validity of the selection procedures, modify the procedures to eliminate adverse impact, or search for alternate selection methods which are valid but have less adverse impact. Civil service merit requirements do not preclude following the EEO guidelines. Federal merit system policy calls for all selection procedures to be job related and valid. We believe the validation requirements of the guidelines reinforce and support merit principles and requirements.

Justice believes the report lacks "conclusive information necessary to perform a knowledgeable analysis of what might be required to achieve compliance." We agree that there are serious obstacles to following the guidelines. The most serious obstacles appear to be obtaining the financial and professional resources necessary to fulfill guideline requirements. To our knowledge, there are no reliable average estimates of the professional and financial resources needed and the costs involved in validating tests or otherwise enforcing and following any mandatory guideline provisions.

There are no projections on how cost effective any set of uniform guidelines will be in terms of achieving EEO. We believe it is important to determine the cost of guidelines, the ability of employers to obtain the financial and professional resources necessary to put them into practice, and their effect on selection programs and minority and female employment patterns.

We believe the EEO Coordinating Council should collect and report information on the actual costs and effects of enforcing and complying with uniform guidelines once

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2/"Conflicting Congressional Policies: Veterans' Preference and Apportionment vs. Equal Employment Opportunity," FPCD-77-61, Sept. 29, 1977.

adopted. We also believe the Council should develop enforcement standards which take into account the abilities of employers to meet guideline requirements in terms of the financial and professional resources available to the employer and the time needed to comply.

Justice also believes the report should address the "state of the art" regarding testing. This topic was discussed in considerable detail in one of our previous reports. Regarding the "state of the art" of testing, we pointed out:

> "Practical limitations in the art of personnel testing and measurement restrict the degree of accuracy attainable and prevent either the assembled or unassembled examination from being perfectly reliable or valid. Improved evaluation procedures can reduce some of this imprecision, but a large part is irreducible. As a result, the examining process cannot accurately rate and rank comparably qualified applicants in exact order of competence." 3/

We agree with Justice that there is considerable room for the exercise of professional judgment in test validation. The FEA guidelines do establish detailed documentation requirements for test validation studies. In this respect, the FEA guidelines follow the style of the American Psychological Association testing standards by listing some documentation requirements as "essential." The Association found the FEA guidelines requirements professionally sound and flexible. The documentation requirements may, however, appear inflexible and confuse employers and others who are unfamiliar with professional testing terms and methods.

Finally, Justice warns against "the pervasive coverage of the guidelines," which the agency believes "is inconsistent with and in conflict with other existing regulations." While the guidelines may be open to legal challenge on this basis, we believe CSC and the President's Reorganization Task Force are working to minimize conflicts between merit system procedural requirements and EEO program objectives, such as compliance with EEO guidelines.

3/"Improvements Needed in Examining and Selecting Applicants for Federal Employment," B-179810, July 22, 1974.

RECOMMENDATIONS

The agreements, policies, and procedures developed and put into practice by the EEO Coordinating Council are intended to "maximize effort, promote efficiency, and eliminate conflict, competition, duplication, and inconsistency among the operations, functions, and jurisdictions" of the Federal EEO enforcement agencies. To ascertain how well uniform guidelines on employee selection procedures fulfill this mandate, we recommend that the Council in its annual report to the President and the Congress present current, reliable information on the actual costs and effects of implementing, enforcing, and complying with the uniform guidelines that are adopted. To promote effective enforcement of and compliance with such guidelines once adopted, we recommend that the EEO Coordinating Council

--Develop and issue documents which clearly explain the guidelines and show how to follow them.

--Develop enforcement standards that allow public and private employers to meet the guidelines within a reasonable time and yet not exceed their financial and professional resources.

--Train agency enforcement personnel to apply the guidelines in a consistent manner.

--Review the agencies' use of the guidelines and make changes as needed to maintain consistent enforcement.

--Encourage member agencies to fund research and provide technical assistance to employers for developing and testing cost-effective methods of achieving equal opportunity in employee selection.

CHAPTER 4

SCOPE OF REVIEW

To identify legal, technical, and administrative issues involved in achieving EEO in employee testing and selection, we reviewed the selection and examining guidelines issued by CSC, Labor, Justice, and EEOC; we also reviewed professional psychological standards for test development and use. The legislative background of title VII and Supreme Court and other judicial decisions on employment testing were also examined.

We obtained information from representatives of the EEO Coordinating Council on efforts to develop uniform Federal guidelines and the impact of the various Federal guidelines on EEO. We also obtained views of groups representing public and private employers, civil rights interests, test publishers, and psychologists. We discussed with them the practicalities, costs, benefits, and problems associated with employment testing, test validation, and Federal guidelines. Professional literature on testing was also reviewed.

This report is one of several resulting from a June 1973 request from the Chairman, Senate Committee on Labor and Public Welfare, concerning the implementation of the EEO Act of 1972 as it applies to Federal employees. (See app. IV for a list of our other reports.)

APPENDIX I

GLOSSARY

Adverse impact	A lower rate of selection for a racial, ethnic, or sex group compared to other groups. The FEA guidelines state that a selection rate for a particular racial, sex, or ethnic group which is less than 80 percent of that of the most successful group is generally regarded as evidence of adverse impact.
Affirmative action plan	An EEO plan for development of employment goals for minorities and women and timetables for their accomplishment.
Criterion (plural: criteria or criterion measures)	A measure of job performance or other work-related behavior against which performance on a test or other predictor measure is compared.
Fair employment practice	A practice through which people with the same expectancies (probabilities) of success on the job have the same probabilities of being hired. It should be recognized, however, that competing and mathematically incompatible definitions of fairness (or its opposite, bias) are proliferating. It cannot be said, therefore, that the psychological profession has settled on a mathematically precise definition of fairness in the use of tests. The definition given here is chosen because of its priority in time and familiarity to testing specialists and because it makes a minimum of mathematical assumptions.

Job analysis	A study of work performed to determine what is to be done on a job, the procedures followed in doing it, and the knowledge, skill, and employee behaviors necessary to carry out these tasks. From job analysis one infers the characteristics of successful performance (criteria) and the personal characteristics which lead to it (predictors).
Job related	A test is job related if it samples knowledges, abilities, skills, or other characteristics shown to be necessary or important for successful performance of a job; a test which is significantly related to an appropriate criterion measure of job performance.
Merit system coverage	A personnel system which includes an objective, nonpolitical method of selection and promotion, and provisions of tenure.
Technically feasible	In criterion-related validity studies: a. Having or obtaining a sufficient number of individuals to achieve findings of statistical and practical significance. b. Having or being able to obtain a sufficient range of scores on the test and job performance measures to produce validity results which can be expected to be representative of the total applicant sample results if the ranges normally obtained were utilized, and c. Having or being able to devise unbiased and reliable measures of job performance or other criteria of employee adequacy.

Validation	The process of investigation by which the validity of a particular type of test use is estimated. What is important here is to identify an ambiguity in the term "to validate" which is responsible for much confusion in the area of employment testing. To validate in ordinary language may mean to mark with an indication of official approval; in this sense it is also possible to "invalidate" or to indicate official disapproval. In the technical vocabulary of employment testing, to validate is to investigate, to conduct research. Thus in validating a test (more properly, in validating a use of a test), one is conducting an inquiry. In this context, the term "invalidating" has no meaning at all.

PROFESSIONAL TESTING STANDARDS AND TERMS

Professional standards for tests

In 1966, a joint committee of the American Psychological Association (APA), the American Educational Research Association, and the National Council on Measurements in Education published a guide to producers and users of tests and devices for diagnosis and evaluation. The APA Standards, as these came to be known, built upon earlier publications of the three organizations. The APA Standards were revised and republished in 1974 partly as a result of awakened concern over serious misuses of tests, including employment discrimination.

Growing concern over professional standards for employee selection research also led APA's Division of Industrial and Organizational Psychology to publish its own guidelines in 1975. The Division 14 Principles were meant to be consistent with the APA Standards and to clarify their applicability to the specific problems of employee selection, placement, and promotion. These sets of guidelines were not intended as legal documents or to set minimal standards of professional practice. Rather, they were to provide a kind of checklist for test developers and users to consider in the designing, selection, administration, scoring, and interpretation of tests.

Testing terms and concepts

Tests are sometimes called predictors because they are used to assess applicant characteristics and make predictions of future job performance. Validation is the process of determining whether and to what extent a test measures what it is supposed to measure or the accuracy of inferences drawn from test scores. Thus, in validating a test, one is conducting an inquiry. Three methods of test validation are generally recognized as basic: content, criterion-related, and construct validation.

Content validation

A content validation study is designed to determine whether the content of a test or measuring instrument (the questions asked or the activities required in a testing situation) adequately samples the universe of

skill, knowledge, or behavior it was designed to assess. A classical content validity inquiry deals with the extent to which an educational achievement test fairly samples the content of material presented in a course of instruction or an employment test explicitly samples the skills and qualities that will be required in performing a job.

Content validation is a judgmental process which involves a systematic, deductive analysis of a job and presenting evidence and making inferences about the test itself as a sample of a knowledge or skill area. For employment tests, the determination of the appropriate knowledge or skill area is based upon job analysis. Job analysis refers to any method of obtaining information about jobs.

Criterion-related validation

Criterion-related validation studies determine to what extent test scores may be used to infer the level of performance on an independent variable called a criterion. Criterion-related validity has sought to determine the extent to which an individual's relative standing on a test correlated with his or her relative standing on such organizationally relevant criteria as course grades, probability of turnover, performance rating, sales volume, hourly output and percentage scrap produced, and so on.

Predictive validity is one method of investigating criterion-related validity. It requires generally that test scores be collected from applicants who are hired without consideration of test scores, and that criterion measures of their job performance be collected at some later point in time. The degree to which test scores predicted criterion performance is then determined.

The other method for investigating criterion-related validity is referred to as concurrent validity. It involves concurrently administering tests to and collecting criterion performance data for employees. Under certain circumstances, data on concurrent validity may be used to estimate a test's predictive validity.

A related term, differential validity, refers to the notion that there are differences in criterion-related

validity for particular subgroups of applicants; that a test which is valid for one group of applicants may not be equally valid for another group. For example, differential validity would be said to exist if a test has different validities for blacks and whites, or for men and women.

Information about the extent of criterion-related validity is often presented in terms of correlation coefficients. Exact mathematical tests determine whether a correlation coefficient is sufficiently large to indicate a relationship between standing on the test and standing on the criterion. As indicated on page 2, discussions of testing benefits have historically been couched in terms of correlations.

Construct validation

Construct validity is used when one claims that a test measures observable consequences of a theoretical idea. Psychologists use the term "construct" to refer to a general trait that is not observable, but is "constructed" from psychological theory about how people perform. Examples of psychological constructs would include "anxiety," "clerical aptitude," "mechanical ability," and "leadership." Construct validity can be defined as a relationship between a test and a theory demonstrated on both logical and empirical grounds. When construct validity is used in selection, it must be shown that the test measures the trait it purports to measure, and that the trait is related to job performance and underlies or explains observable variations in job performance.

Construct validity is rarely used in employment selection. There is a lack of substantial literature dealing with the application of construct validity to employment practices. No detailed requirements for its use were presented by Division 14.

Reasons for validating tests

Test validation is costly and time consuming. There are, however, important benefits associated with using validated selection procedures. Valid selection procedures increase the probability that individuals most likely to succeed on the job are hired. Validation helps insure

that non-job-related factors which unfairly discriminate are eliminated from the selection process. From a cost perspective, validation can save an organization much money over the years by improving selection techniques. Use of valid selection procedures can reduce employee turnover and training costs, increase worker productivity and overall organizational efficiency.

Employees and applicants also derive many benefits from the use of validated selection procedures. As one public personnel official pointed out, "a properly placed employee is a productive person, a happy person, and generally a contributor not only to the working setting but to the community, his home, and elsewhere."

OTHER EEO LAWS AND EXECUTIVE ORDERS

Title VI of the 1964 Civil Rights Act, as amended, and comparable provisions in other Federal grant statutes prohibit discrimination in programs and activities receiving Federal financial assistance. While Justice has responsibility for coordination, responsibility for enforcing title VI and the civil rights provisions of other grant statutes rests with the Federal agencies which extend financial assistance. Each of the agencies can promulgate guidelines to help insure that employment in the grant program is not subject to discrimination.

Executive Order 11246, as amended by Executive Order 11375, prohibits discrimination against employees or applicants on the basis of race, creed, color, national origin, or sex by Federal Government contractors, subcontractors, and federally assisted construction contractors. It requires contractors to take affirmative action to promote EEO for minorities and women. The Office of Federal Contract Compliance Programs monitors the Government-wide contract compliance program and issues various rules and regulations to carry out this Executive order.

Executive Order 11478, issued in 1969, requires nondiscrimination in Federal employment and specifies requirements for implementing affirmative action programs in Federal agencies. CSC is responsible for overall supervision and enforcement of these programs.

CSC is also responsible for administering the Civil Service Act of 1883. This law requires that appointments to the Federal service be based on merit and fitness, and determined through open competitive examinations. CSC considers the merit principles of civil service laws and the EEO provisions of Executive Order 11478 and title VII to be synonymous operating concepts.

Under the Intergovernmental Personnel Act of 1970, CSC is authorized to provide technical and financial assistance to State and local governments and their agencies for improving personnel management and employee training, with a concerted emphasis on EEO. Under the Act, CSC also develops and administers merit system standards to State and local agencies receiving funds

under certain Federal programs. In the overall area of personnel selection, the standards have called for open competition, test validity, employment of the most competent, and affirmative action to help insure EEO.

The 1972 amendments to the Civil Rights Act of 1964 fixed the Federal Government's obligation to make all personnel actions free from discrimination. CSC was given authority to enforce EEO in the Federal Government "through appropriate remedies" and to issue such rules, regulations, orders, and instructions as deemed necessary. The Federal courts were afforded full enforcement powers through actions brought by aggrieved persons after final agency disposition of or failure to act on the complaint.

The EEO Act of 1972 eliminated the exemption of State and local governments from the requirements of title VII. Charges of discrimination by State and local governments must be filed with EEOC. If no conciliation agreement is reached, only the aggrieved person or the Attorney General may bring a civil action.

The 1972 amendments give EEOC authority to file civil actions against private employers, labor unions, and employment agencies, as well as responsibility for "pattern or practice" litigation previously exercised by the Attorney General. However, EEOC was denied direct enforcement capabilities, such as the power to issue cease-and-desist orders. The EEO Act of 1972 emphatically reaffirmed a preference for ultimate judicial enforcement of title VII.

OUR REPORTS ISSUED ON THE SUBJECT OF THE EEO ACT OF 1972

"National Aeronautics and Space Administration's Equal Employment Opportunity Program Could Be Improved," FPCD-75-107, Apr. 16, 1975.

"Upward Mobility Programs in the Federal Government Should Be Made More Effective," FPCD-75-84, Apr. 29, 1975.

"Equal Employment Opportunity Discrimination Complaint Systems for Civilian Employees at Selected Army Installations," FPCD-75-118, May 28, 1975.

"Report on Management Information Needs of the Equal Employment Opportunity Program of the Federal Government," Civil Service Commission, FPCD-76-71, Sept. 3, 1976.

"General Services Administration's Upward Mobility Program," FPCD-76-84A, Sept. 13, 1976.

"Review of Upward Mobility Using Job Restructuring," Department of the Interior, FPCD-76-84, Nov. 2, 1976.

"Review of the Department of the Army's Upward Mobility Program," FPCD-77-3, Dec. 13, 1976.

"Upward Mobility Using Job Restructuring," Department of the Navy, FPCD-77-9, Jan. 7, 1977.

"Upward Mobility Using Job Restructuring," Department of the Air Force, FPCD-77-8, Jan. 10, 1977.

"Upward Mobility Program Can Be Improved," Department of Agriculture, FPCD-77-2, Mar. 21, 1977.

"Progress Made by Agencies in Implementing Upward Mobility Programs," Civil Service Commission, FPCD-77-10, Mar. 28, 1977.

"System for Processing Individual Equal Employment Opportunity Discrimination Complaints: Improvements Needed," FPCD-76-77, Apr. 8, 1977.

"Problems of the Federal Employee Equal Employment Opportunity Program Need to Be Resolved," Civil Service Commission and other Federal Agencies, FPCD-76-85, Sept. 9, 1977.

"Conflicting Congressional Policies: Veterans' Preference and Apportionment vs. Equal Employment Opportunity," FPCD-77-61, Sept. 29, 1977.

AREAS IN WHICH GUIDELINES AGREE

1. Similar purpose and coverage

   The EEOC and FEA guidelines and the October 1977 draft of proposed uniform guidelines are intended to assist employers in following the requirements of Federal law and apply to tests and other selection procedures used as the basis for making employment decisions.

   The existing and proposed guidelines define employment decisions to include hiring, promotion, referral, retention, and so forth.

2. Requirement to validate

   The EEOC guidelines require evidence of validity when the use of any test has an adverse impact on the employment opportunities of a racial, sex, or ethnic group. The FEA guidelines and the October 1977 draft state that if the overall selection process has an adverse impact, the individual selection procedures should be analyzed; and evidence of validity is required only for those selection procedures which have an adverse effect.

3. Recognition of validity strategies

   Both the EEOC and FEA guidelines and the October 1977 draft recognize that the three types of validity studies--criterion-related, content, and construct--may demonstrate job-relatedness.

4. Recognition of APA Standards

   The EEOC and FEA guidelines and the October 1977 draft contain references to the APA Standards for guidance on how to perform validation studies.

5. Require entry-level testing

   The EEOC and FEA guidelines and the October 1977 draft require an employer to evaluate applicants for entry-level jobs unless employees can be expected to move to a higher-level job in a reasonable period of

time.

6. Alternatives to validation

If an employer is unable or unwilling to validate, the EEOC guidelines provide the option of changing selection procedures to eliminate conditions suggestive of discrimination. The FEA guidelines and the October 1977 draft also suggest modifying selection procedures to eliminate adverse impact or searching for alternative selection procedures which have less adverse impact if it is not feasible or desirable to validate.

7. Cutoff scores

The EEOC and FEA guidelines and the October 1977 draft state that if cutoff scores are used, they should be reasonable and consistent with normal expectations of acceptable job proficiency.

8. Transporting validation studies

Under certain conditions, both sets of guidelines and the October 1977 draft permit employers to use validation studies conducted in other organizations.

9. No assumption of validity

Both sets of guidelines and the October 1977 draft state that the general reputation of a test, its author, or its publisher will not be accepted in lieu of evidence of validity.

10. Disparate treatment

Both sets of guidelines and the October 1977 draft state that employees or applicants denied equal treatment because of prior discriminatory practices or policies must be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination.

11. Affirmative action

The EEOC and FEA guidelines and the October 1977 draft state that the use of tests validated pursuant

to the guidelines does not relieve employers of their obligations to undertake affirmative action to assure EEO. The October draft discusses affirmative action in much greater detail than the EEOC and FEA guidelines. Regarding affirmative action, the draft states that the guidelines are intended to encourage adoption and implementation of voluntary affirmative action programs. The draft endorses both for private employers and governmental employers the EEO Coordinating Council's "Policy Statement on Affirmative Action Programs for State and Local Government Agencies" (41 Federal Register 38814, Sept. 13, 1976). The October draft repeats some of the major sections of the policy statement, as follows:

--"Voluntary affirmative action to assure EEO is appropriate at any stage of the employment process. The first step * * * should be an analysis of the employer's work force to determine whether percentages of sex, racial, or ethnic groups in individual job classifications are substantially similar to the percentages of those groups in the relevant job market who possess the basic job-related qualifications. When substantial disparities are found, each element of the overall selection process should be examined to determine which elements operate to exclude on the basis of sex, race, or ethnic group.

--"When an employer has reason to believe that its selection procedures have the exclusionary effect described, it should initiate affirmative steps to remedy the situation. Such steps, in design and execution, may be race, color, sex, or ethnic 'conscious.'"

DEPARTMENTS, AGENCIES, ORGANIZATIONS, AND INDIVIDUALS CONTACTED

Civil Rights Commission, Headquarters, Washington, D.C.

Civil Service Commission, Headquarters, Washington, D.C.

Department of Justice, Headquarters, Washington, D.C.

Department of Labor, Headquarters, Washington, D.C.

Equal Employment Opportunity Commission, Headquarters, Washington, D.C.; Region VII, San Francisco

Dr. Richard S. Barrett, research psychologist; Director, Laboratory of Psychological Studies, Stevens Institute of Technology

Dr. Jerome Doppelt, Director, Psychological Measurement Division, The Psychological Corporation

Lawyers' Committee for Civil Rights under Law

NAACP Legal Defense Fund

American Society for Personnel Administration

Ad Hoc Industry Group (composed of public and private employers and associations which represent employers)

Bureau of National Affairs

Robert Garnier, Personnel Director, Civil Service Commission, Milwaukee, Wisconsin

Girard Davidson, Personnel Director, Duke Power Company

National Civil Service League

Herbert Kaplan, Deputy Director of Personnel, Los Angeles, California

Robert Krause, Director of Personnel, Hartford, Connecticut

Arnold McDermott, Personnel Director, Denver, Colorado

Dr. Grace Wright, New York State Department of Personnel

APPENDIX VI

Selma Mushkin, Director, Public Services Laboratory, Georgetown University

William Danielson, Personnel Director, Sacramento, California

Dr. Steven Stanard, Private practitioner, Project Director (formerly), Industrial Systems Laboratory, Science Research Associates

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D C 20415

CHAIRMAN

August 30, 1977

Mr. H. L. Kreiger
Director, Federal Personnel and
Compensation Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Kreiger:

This is in response to your letter of July 22, 1977 requesting the Commission's comments on GAO's draft report entitled "Federal Efforts to Provide Equal Employment Opportunity Selection Guidelines." As the draft report indicates, the four agencies which have issued selection guidelines (the Departments of Labor and Justice, the Civil Service Commission and the Equal Employment Opportunity Commission) currently are engaged in an intensive effort to develop a uniform set of guidelines. All of the agencies recognize the need for the Federal Government to speak with one voice in this important and highly complex subject. Numerous staff meetings have already taken place and the principals will meet at the end of this month.

Your report makes clear and we recognize the difficulty of the subject matter involved. However, we believe that the differences separating the agencies may not be as deep seated as your report suggests. We are optimistic that the present leadership of the four agencies will be able to reconcile remaining differences, develop a uniform position and a draft set of guidelines at an early date. We do not believe that legislation is either necessary or appropriate to resolve this problem.

We also think that detailed comments on your report by each of the four agencies at this time would have the effect of exacerbating differences thus making it more difficult to achieve a uniform position on this issue. For that reason we are refraining from making detailed substantive comments at this time.

Sincerely,

Alan K. Campbell
Chairman

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D. C. 20506

August 31, 1977

OFFICE OF THE CHAIR

Mr. Gregory J. Ahart
Director
U.S. General Accounting Office
Human Resources Division
Washington, D.C. 20548

Dear Mr. Ahart:

Your letter of July 22 to Commissioner Eleanor Holmes Norton concerning a draft proposed report entitled "Federal Efforts to Provide Equal Employment Opportunity Selection Guidelines" has been referred to me for response.

As the letter to you from Assistant Attorney General Rooney indicates, the Equal Employment Opportunity Commission has been participating in a renewed effort to develop uniform guidelines. We share the views expressed by the Assistant Attorney General with respect to the likelihood of arriving at a uniform draft set of guidelines by November 1, and accordingly, believe that legislation is not necessary at this time on this matter, and that detailed comments by each agency on the draft report would not be useful at this time.

Sincerely,

Alfred W. Blumrosen
Consultant to the Chair

U.S. DEPARTMENT OF LABOR
OFFICE OF THE ASSISTANT SECRETARY
WASHINGTON

SEP 12 1977

Mr. Gregory J. Ahart
Director
Human Resources Division
U.S. General Accounting Office
Washington, D.C. 20548

Dear Mr. Ahart:

The draft of a proposed report by the General Accounting Office on "Federal Efforts to Provide Equal Employment Opportunity Selection Guidelines" has been reviewed. Generally, we feel that the report provides a thorough and comprehensive review of the role that tests and other selection procedures play in personnel decisions and the efforts of government agencies to eliminate the discriminatory effects of these selection procedures within the context of Federal law. The report will, therefore, provide an excellent source of information for Congress in their efforts to bring about a uniform Federal position on the non-discriminatory use of selection procedures.

Two major concerns we have with the report are in the discussion of the problems connected with the existence of separate sets of guidelines and the proposed solutions to this situation. Compared to the detailed discussion of the other issues, these subjects appear to be dealt with rather briefly. For example, OFCCP's enforcement of the guidelines is based on a contractual arrangement between the Government and the employer, rather than on the Civil Rights Act. Should an employer's voluntarily-assumed obligations under contract law necessarily be the same as the mandatory obligations under Federal law? More importantly, what are the practical implications of having more than one set of guidelines? Is it likely that a given employer's selection procedures will meet one set of guidelines and not the other? These issues, as well as others on the same topic, should be discussed in depth.

(See GAO note 1, p. 58.)

(See GAO note 2 below.)

In summary, I wish to reiterate that this report is, in general, excellent. I hope our comments will be of use to you.

Sincerely,

ALFRED M. ZUCK
Assistant Secretary for
Administration and Management

GAO notes:

1. The deleted comments relate to matters which were discussed in the draft report but omitted in this final report.

2. The deleted material suggested minor changes to the report. We have considered these changes in this final report.

APPENDIX X

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

OCT 26 1977

Victor L. Lowe
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Lowe:

This letter is in response to your request for comments on the draft report entitled "Federal Efforts to Provide Equal Employment Opportunity Selection Guidelines."

Since early summer, the four agencies which have issued equal employment opportunity (EEO) selection guidelines--the Departments of Labor and Justice, the Equal Employment Opportunity Commission and the Civil Service Commission--have engaged in an intensive effort to develop a uniform set of guidelines. All of the agencies recognize the need for the Federal government to speak with one voice on this important and highly complex subject. Numerous meetings have already taken place and further meetings of the principals are contemplated. While we recognize the difficulty of reaching agreement on this matter, we believe that the differences separating the agencies are not as deep-seated as the report suggests, and that the present leadership of the four agencies can reconcile them, develop a uniform position, and draft a set of guidelines before November 1.

Although sincere efforts are being made to reach agreement on a uniform set of guidelines, we believe it is essential that we respond frankly and candidly on several issues of major concern to us. We have organized our comments around four major issues which more directly affect personnel interests. In particular, we would like to point out that we believe GAO should have investigated and reported on these areas with a greater degree of detail and thoroughness. These areas relate to:

- Valid EEO Guidelines Consistent with Legislative Intent;
- Public Sector Considerations in Implementing EEO Guidelines;
- Barriers to Compliance with EEO Guidelines;
- The Scope of EEO Guidelines.

Valid EEO Guidelines Consistent with Legislative Intent

We generally agree that it is important to develop and implement uniform guidelines concerning the proper and professional use of tests. However, we feel it equally important that uniform guidelines in and of themselves have the same validity as is required of selection procedures, and, moreover, reflect the intent of Congress as expressed in Civil Rights Legislation. Perhaps the clearest expression of this intent is found in section 703(h) of Title VII, the Tower Amendment, which reads as follows.

> "Notwithstanding any other provision of this subchapter it shall not be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin."

The GAO report, while suggesting remedies which should certainly promote uniformity, does not adequately deal with the ramifications of the issue of achieving professionally acceptable standards for test validation that are consistent with the intent of the Civil Rights Legislation passed by Congress. It is especially important that these issues be dealt with, because as the GAO report states, "The reasons for disagreements among the EEO Coordinating Council members on uniform guidelines appear to go beyond differences of opinion on technical questions to more basic issues of how agencies perceive and pursue their individual operating responsibilities." These differences among agencies regarding

APPENDIX X

the manner in which they perceive and pursue their individual operating responsibilities suggest an inconsistent interpretation and application of the Civil Rights Legislation passed by Congress.

We believe Congress, in passing Civil Rights Legislation, contemplated a uniform posture concerning its enforcement. Accordingly, fundamental differences in philosophy and approach resulting from agency interpretation of such legislation should not be permitted to continue. Steps should be taken to establish such a uniform posture even prior to further attempts to develop meaningful common guidelines for EEO enforcement.

Public Sector Considerations In Implementing EEO Guidelines

The report does not adequately reflect certain unique considerations inherent in test usage by public sector personnel systems. The broad based contacts with public sector personnel officials made by GAO in the preparation of this report certainly should have surfaced these considerations.

Public sector personnel systems operating under civil service merit requirements mandate the development of valid selection procedures. In such systems, merit is perceived on an individual basis, and tests are used not only to determine whether individuals can perform a job, but also to rank them in terms of their ability to perform it. The problem therefore becomes one of designing a selection procedure that is equally valid for minority and non-minority group members, and that makes meaningful distinction among individuals. If this objective is not achieved, and it rarely is, even after all professionally acceptable techniques have been applied, adjustment of procedures to result in more minority selections is not presently a permissible remedy to achieve compliance with EEO guidelines. Therefore, in the public sector, guidelines become an ideal which is constantly sought but seldom achieved, while in the private sector they are a lever through which to enforce EEO objectives, i.e., more minority hires.

Barriers to Compliance with EEO Guidelines

Assuming a good faith effort on the part of employers to comply with EEO guidelines, important obstacles still remain to be overcome if compliance is to be achieved. The more serious of these obstacles includes available professional resources, the state of the art as it relates to the validation of tests, and the cost of validating tests. While GAO has to an extent attempted to deal with some of the above issues, the report presentation lacks the conclusive information necessary to perform a knowledgeable analysis of what might be required to achieve compliance.

(See GAO note 1, p. 58.)

From our own rather limited experience, it is our opinion that the GAO sample considerably understates the cost of validation. In 1972, an organization within the Department initiated the development of a test for a single occupation at the entry level only. To date, the overall expenditures have been roughly estimated at $250,000. Conceivably another 2 to 3 years may be required to conclude the validation study for the single major occupation, bringing the final cost to perhaps $400,000 or $500,000. Extrapolating from these very rough estimates, a cost estimate of 22 to 23 millions of dollars would be conceivable considering the fact that the Department has 324 occupations. Even though the actual cost might be less or more than indicated, the expenditures will easily run into the millions of dollars. We hesitate to attempt any definitive cost estimates in view of the limited single experience mentioned above, coupled with the fact that time has not permitted any precise in-depth study of this one effort which is still incomplete.

At any rate, prior to making further efforts to adopt uniform guidelines, it would seem advisable to secure definitive estimates of the costs involved in implementing the program being proposed in view of the budgetary implications. It is also essential that a cost-benefit equation be developed to assure that the investment in manpower and money will achieve the desired goals. It would have been much more helpful if GAO had addressed this issue in greater detail.

The report does not address the issue of whether the professional resources available to undertake the task of validation are adequate. We suggest that examination of such resources is crucial to a knowledgeable determination. American Psychological Association estimates indicate there are approximately 2,200 qualified practitioners of Industrial Psychology in the United States, 20 percent of whom work for the government. Given the relatively small number of practitioners, and what is sure to be a substantially increased demand for their services should a uniform requirement to validate tests be developed and enforced, it is likely that resources will not be adequate to the task.

The final barrier that we feel should be addressed by GAO is that of the "state of the art" regarding testing. We appreciate the problems entailed in discussing in a report of this nature the technical aspects of test validation. However, even after the excellent discussion presented by the GAO concerning the technical aspects of test validation, we are not altogether clear as to why there is such substantial disagreement on the subject, not only among the concerned agencies, but among other professionals in the field.

Our one suggestion with respect to remedying this deficiency is that GAO obtain further information in this respect, exploring in greater depth the differences of professional opinion that have caused the present impasse.

(See GAO note 1, p. 58.)

Our own views in this regard are, that while manifold advantages could ultimately accrue to the Federal service in terms of more valid and meritorious selection procedures, the fact remains that at best psychometrics is an imprecise art. Therefore, since there is considerable room for the exercise of professional judgment, competent practitioners all operating within the parameters of the standards promulgated by the American Psychological Association can argue the relative validity of any particular system of guidelines. Accordingly, to prescribe in minute detail what must be done, without allowing latitude for professional judgments that must necessarily be made, does not serve the objective of obtaining uniform guidelines, but rather provides a basis for litigation concerning whatever standard is developed. Moreover, such an absolute approach is inconsistent with the imperfections inherent in the existing "state of the art." The GAO report should certainly address this point.

The Scope of EEO Guidelines

(See GAO note 2, p. 58.)

We would also hope, should GAO determine additional discussion as to the scope of the guidelines is warranted, that attention will be devoted not only to the types of personnel determinations subject to the guidelines, but to the management level at which the determinations are customarily made, and the extent to which capability exists at that level to conduct validation studies. We would further point out the misconception that the U.S. Civil Service Commission's testing program bears the brunt of validation requirements in the Federal sector. This is

certainly not the case, as Federal agencies make numerous day-to-day personnel decisions which affect the approximately 2½ million employees in the Federal work force. These decisions, which are directly carried out by agencies, are certainly subject to the validation requirements of the Equal Employment Opportunity Guidelines. We estimate they may well account for 80 to 90 percent of the employment decisions that will be made in accordance with those guidelines.

In summary, we believe that the first and foremost question has not been adequately addressed; namely, that of legislative intent. Nor do we believe that the internal validity of the guidelines, both with respect to legislative intent and to the content of the guidelines themselves, has been adequately examined. We are also concerned because there appears to have been inadequate recognition of the crucial difference between guideline application to the public versus private sectors. Unlike the private sector, where avoidance of adverse impact is sufficient and where the emphasis is in effect on the group, in the Federal sector a merit process is mandatory, affects each individual and every aspect of every individual selection, and mere avoidance of adverse impact will not suffice. Guidelines of whatever sort, serve to define and delineate the precise nature of the mandated merit selection process.

We have mentioned the all-too-obvious deficiencies of the "state of the art," the failure to obtain adequate cost estimates and the probable enormity of such costs, as well as the question of resource availability--resources which at the present are almost entirely lacking in Federal agencies. Given the potentially enormous budgetary implications, we are especially concerned by the fact the Office of Management and Budget has never been intimately involved in this matter. Lastly, we have sought to warn against the pervasive coverage of the guidelines which is not only in excess of that generally recognized, but is inconsistent with and in conflict with other existing regulations. Schedules A, B, and C, for example, are covered. Yet Schedule C was established to provide each new administration with a measure of flexibility outside the usual merit process in filling positions of a confidential or policy nature. Schedule A is based on the impracticability to competitively or noncompetitively examine, Schedule B on the impracticability

to competitively examine. Related thereto, are the largely unrecognized impact of the guidelines on the agencies themselves which, in fact, will bear the major burden, and the almost limitless litigative possibilities which will be opened up by such guidelines.

We appreciate the opportunity given us to comment on the draft report. Should you have any further questions, please feel free to contact us.

Sincerely,

Kevin D. Rooney
Assistant Attorney General
for Administration

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